upon him to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things, such as the tenant was called upon to remedy, and not the landlord, as between landlord and tenant. Judgment affirmed.

Court of Appeals of Texas.

CHARLES FRASHER *v.* THE STATE OF TEXAS.

Marriage is not a contract protected by the constitution of the United States or any of its amendments. It is a civil status under the control of the states, and the existence of the relation and the rights, obligations and duties arising out of it are to be determined exclusively by state laws.

The provision of the Texas code making marriage of a white person to a negro an indictable offence is not repugnant to or avoided by the fourteenth and fifteenth amendments to the constitution of the United States, or the legislation of Congress under them.

The fact that by the code the penalty is imposed on the white person only, does not make it obnoxious to the Civil Rights Bill.

APPEAL from the District Court of Gregg county. The indictment in this case charged that on March 18th 1875, in the county and state aforesaid, the defendant, being then and there a white man, did then and there unlawfully, knowingly and feloniously, marry a negro, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

The indictment was based upon article 2016 of the Criminal Code (P. D.), which is as follows: "If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood, descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married, in or out of the state, shall continue within this state to cohabit with such negro, or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

The defendant was tried at the July Term 1877, of the District Court of Gregg county, and convicted, and his punishment assessed at four years' confinement in the penitentiary.

The opinion of the court was delivered by

ECTOR, P. J.—The counsel for the defendant insists that the Act of 1858, under which this prosecution was had, is in conflict

with the fourteenth and fifteenth amendments of the constitution of the United States and the first section of the Civil Rights Bill; that the statute prohibiting such marriages was passed in the interest of slavery, before that institution was abolished, and when the negro was not a citizen of the United States, and that it cannot be enforced, because it prescribes a penalty to be inflicted upon the white person alone.

The first question, then, presented for the consideration of this court, is whether the positions assumed, as above stated, by the defendant's counsel, or any one of them, are correct. We are not unmindful of the questions involved, and have given them our most careful and thoughtful consideration. No question more important in its consequences, or more profoundly interesting to the people of this country, has ever been before this court.

It is evident that the fifteenth amendment has no application or bearing whatever upon the question at issue. The fourteenth amendment contains four separate and distinct propositions:—

1. It confers the right of citizenship upon all persons born or naturalized in the United States, and who are subject to the jurisdiction thereof.

2. It declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

3. It prohibits any state from depriving any citizen of life, liberty or property without due process of law.

4. It provides that no state shall deny to any person within its jurisdiction the equal protection of the law.

In placing a construction upon a constitution, or any clause or a part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief and the remedy. The court should also look to the nature and objects of the particular powers, duties and rights in question, with all the lights and aids of cotemporary history, and to give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed: *Kendall* v. *United States*, 12 Peters 524; *Prigg* v. *Commonwealth*, 16 Id. 539.

In the *Slaughter House Cases*, the Supreme Court of the United States, in referring to the thirteenth, fourteenth and fifteenth

amendments of the constitution, say: "An examination of the history of the causes which led to the adoption of these amendments, and of the amendments themselves, demonstrates that the main purpose of all the last three amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppression of the white men who had formerly held them in slavery. In giving construction to any of these articles, it is necessary to keep this main purpose in view, though the letter and spirit of those articles must apply to cases coming within their purview, whether the party concerned be of African descent or not."

We will now proceed briefly to construe the first section of the fourteenth amendment. The first clause of this amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This clause declares and determines who are citizens of the United States and how their citizenship is created. Before its enactment there had been much diversity of opinion among jurists and statesmen, whether there was any citizenship independent of that of state citizenship, and, if any existed, as to the manner in which it originated. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, and to declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed. It clearly recognises the distinction between citizenship of the United States and citizenship of a state. A person must reside within a state to make him a citizen of it. He must be born or naturalized in the United States to be a citizen of the union. The Supreme Court of the United States, in construing this clause, say, "that its main purpose was to establish the citizenship of the negro, can admit of no doubt." The phrase, "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States: 16 Wall. 36.

The language of the second clause of the section under consideration is, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The first mention of the words "privileges or immunities," is found in the fourth of the articles of the old confederation.

In the constitution of the United States, which superseded the articles of confederation, we find in section two of the fourth article the following words: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." This clause of the constitution has been construed. The first and leading case on this subject is that of *Corfield* v. *Coryell*, decided by Justice WASHINGTON, in the Circuit Court for the district of Pennsylvania in 1824. "The inquiry," he says, is, "what are the privileges and immunities of citizens of the several states? We find no hesitancy in confining these expressions to those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may generally prescribe for the general good of the whole:" 4 Wash. C. C. 380.

This definition of the privileges and immunities of the citizens of the states is adopted in the main by the Supreme Court of the United States in the case of *Ward* v. *The State of Maryland*, 12 Wall. 430. See also case of *Paul* v. *Virginia*, 8 Id. 180.

This clause, under consideration, did not profess to control the power of the state governments over the rights of their own citizens. Its intent and purpose were to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of other states within your jurisdiction. It was never the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, to transfer the security and protection of all the civil rights embraced within the entire dominion of privileges and immunities of citizens of the states, from the states to the federal government: *Crandall* v. *Nevada*, 6 Wall. 36.

It may be said that the cases cited were decided before the pass-

age of the fourteenth amendment to the federal constitution. The Supreme Court of the United States, after the passage of the fourteenth amendment, have had occasion to construe this clause. The following extract is taken from the opinion of the court: "Was it the purpose of the fourteenth amendment by the simple declaration that no state shall make or enforce any law which shall abridge the *privileges or immunities of citizens* of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the state?"

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states in their most ordinary and useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment.

"The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of the instrument. But when, as in the case before us, the consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions, when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and federal governments to each other and of both of these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of

doubt." "We are convinced that no such results were intended by the Congress which proposed those amendments nor by the legislatures of the states which ratified them:" 16 Wall. 36.

Again, in the case of *Minor* v. *Happersett*, the same court held, "that the fourteenth amendment of the constitution of the United States does not add to the 'privileges or immunities' of citizens, but only furnishes additional protection for the privileges, &c., already existing:" 21 Wall. 162.

The third clause of the section is as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law." "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure.

The fourth clause of the fourteenth amendment is: "Nor shall any state deny to any person within its jurisdiction the equal protection of the law." This clause was added in the abundance of caution, for it provides, in express terms, what was the fair, logical and just implication from what had preceded it, and that was, that persons made citizens by the amendment, should be protected by the laws in the same manner, and to the same extent, that white citizens were protected.

In the *Slaughter House Cases*, 16 Wall. 36, the Supreme Court of the United States say: "We doubt very much whether any action of a state, not directed by way of discrimination against the negro as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race, and that emergency, that a strong case would be necessary for its application to any other."

It is urged that the Civil Rights Bill has abrogated the section of our statute under which the indictment in this cause was found. The first section of the Civil Rights Bill is in these words: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and that such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory of the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property,

and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

The first section of the act known as the Civil Rights Bill, confers upon persons of the African race power to make and enforce contracts. The power, as conferred in the first part of the section, is without limitation, but, in the latter part of the section, it is expressly restricted and qualified by the plain declaration that the rights conferred shall be enjoyed in the same manner and to the same extent "as is enjoyed by white persons."

It therefore becomes necessary to inquire whether Congress possesses the power under the federal constitution to pass a law regulating and controlling the institution of marriage in the several states of the union.

Mr. Justice NELSON, in delivering the opinion of the Supreme Court of the United States in the case of *The Collector* v. *Day*, 11 Wall. 113, says: "It is a familiar rule of construction of the constitution of the union that the sovereign powers vested in the state governments by their respective constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the states respectively, or to the people.' The government of the United States can therefore claim no powers which are not granted to it by the constitution, and the powers actually granted to it must be such as are expressly given, or given by necessary implication. The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme, but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government, in its sphere, is independent of the states."

To the same purport are *Fifield* v. *Close*, 15 Mich. 505; *State*

v. *Garten*, 32 Ind. 1; *State* v. *Gibson*, 36 Id. 389; *People* v. *Brady*, 40 Cal. 198; *Lane County* v. *Oregon*, 7 Wall. 76; *United States* v. *Cruikshank et al.*, 2 Otto 542; *Bradwell* v. *The State*, 16 Wall. 130; *Gibbons* v. *Ogden*, 9 Wheat. 203.

Within this class, which is not granted or secured by the federal constitution, but left to the exclusive protection of the states, is that immense class of legislation mentioned by Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheat. 203, which embraces everything within the territory of a state not surrendered to the general government, and which is necessary in the regulation of the police, morals, health, internal commerce and general prosperity of a community, and which is justly subject to state regulation. See also *Commonwealth* v. *Kemball*, 24 Pick. 350.

Mr. Justice STORY, in *Prigg* v. *Commonwealth*, 16 Peters 539, says: "To guard, however, against possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatever to doubt or interfere with the police power belonging to the states in virtue of their general sovereignty; that the police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

The police power of the states is very ably discussed by the Supreme Court of the United States in the case of *The City of New York* v. *Miln*, 11 Peters 139. In this last case cited the court say, "that all those powers which relate to merely municipal legislation, or what may more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

Mr. Justice BUSKIRK, of the Supreme Court of Indiana, has so ably discussed this question in an opinion delivered by him that, at the expense of being tedious, we will copy a portion of what he has said, fully endorsing the same. He says: "There can be no doubt that Congress possesses the power to determine who may or may not make contracts, and prescribe the manner of their enforcement, in the District of Columbia, and in all other places where the federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts or the manner of enforcing them in the several states. Nor is there any doubt that Congress may provide for the punishment

of those who violate the laws of Congress; but we deny the power of Congress to regulate, control, or in any manner to interfere with the states in determining what shall constitute crimes against the laws of the state, or the manner or extent of punishment of persons charged and convicted with the violation of the criminal laws of a sovereign state. In this state marriage is treated as a civil contract, but it is more than a civil contract. It is a public institution, established by God himself, is recognised in all christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right, in the states, to regulate and control, to guard, protect and preserve this God-given, civilizing and christianizing institution, is of inestimable importance, and cannot be surrendered nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of a local and domestic character. This would result in the destruction of the states:" *The State* v. *Gibson*, 36 Ind. 389.

Mr. Bishop, in his work on Marriage and Divorce, vol. 1, 4th ed., sect. 87, says: "All our marriage and divorce laws, and of course all statutes on the subject, so far as they pertain to localities embraced within the territorial limits of the particular states, are state laws and state statutes; the national power with us not having legislative or judicial cognizance of the matter within their localities."

Marriage is not a contract protected by the constitution of the United States, or within the meaning of the Civil Rights Bill. Marriage is more than a contract within the meaning of the act. It is a civil status left solely by the constitution and the laws to the discretion of the states under their general power to regulate their domestic affairs. The rights, obligations and duties arising from it are not left to be regulated by the agreement of the parties, but are matters of municipal regulation, over which the parties have no control.

The Supreme Court of North Carolina, *The State* v. *Kennedy*, 76 N. C. 251, says: "There can be no doubt of the power of every country to make laws regulating the marriage of its subjects, to

declare whom they may marry, and the consequences of their marrying." It is clear to our mind that neither the fourteenth amendment nor the Civil Rights Bill has abrogated article 2016 of our criminal code.

Again, the counsel for the defendant insists that because the statute, under which the indictment was found in this case, fixes a penalty upon the white person alone, and none upon the negro, that it, therefore, violates the fourteenth and fifteenth amendments of the constitution of the United States and the fourth section of the Civil Rights Bill. It is conceded by him that if the statute upon which this prosecution is based punished both the white person and the negro alike it would not be obnoxious to the objections he urges against it, but would be constitutional, and clearly within the legislative powers of the state. It is, then, conceded that the states can prohibit the intermarriage of the races, and it therefore follows, as the night follows the day, that this state can enforce such laws as she may deem best in regard to the intermarriage of whites and negroes in Texas, provided the punishment for its violation is not cruel or unusual. If she cannot, what is to prevent it? The objection to our statute that it does not punish both parties alike should be addressed to the legislative and not to the judicial branch of the government. Can it be truly said that the law is illegal because the race sought to be protected by the amendments and the Civil Rights Bill is not punished?

Civilized society has the power of self-preservation, and marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting the intermarriage between the white and black races; and the courts, as a general rule, have sustained the constitutionality of such statutes. We are aware that the Supreme Court of Alabama has held that a statute of that state, which prohibited the intermarriage of whites and negroes, was abrogated by the fourteenth amendment to the federal constitution; but this opinion is not supported by reason or authorities: *Burns* v. *State*, 48 Ala. 195.[1]

Has the law of this state, passed in 1858, making it a felony for a white person to marry a negro, been repealed? We think not. Implied repeals are not favored; nothing but a statute will repeal

[1] This case has since been explicitly overruled by the Supreme Court of Alabama in *Green* v. *The State*, at the December Term 1877, not yet reported.—Ed. Am. Law Reg.

a statute: Sedgwick on Stat. and Const. Law 96, 105. During the period since the negroes were emancipated the law-making power of Texas has not only failed to repeal article 2016, but the legislature of 1866 (ch. 128, p. 131), in repealing laws "relating to slaves and free persons of color," expressly "provided, nevertheless, that nothing herein shall be so construed as to repeal any law prohibiting the intermarriage of the white and black races." The constitution of 1869 (ch. 12, sec. 27) legalized the marriage of those who had been living together as husband and wife, *and both of whom, by the law of bondage*, were precluded from the rites of marriage; but this only applied to negroes. See *Clements* v. *Crawford*, 42 Texas 601.

It has always been the policy of this state to maintain separate marital relations between the whites and the blacks. It is useless for us to cite the different statutes on this subject, enacted from time to time, showing that the people of Texas are now, and have ever been, opposed to the intermixture of these races. Under the police power possessed by the states, they undoubtedly, in our judgment, have the power to pass such laws. If the people of other states desire to have an intermixture of the white and black races, they have the right to adopt such a policy. When the legislature of this state shall declare such a policy by positive enactment we will enforce it; until this is done we will not give such a policy our sanction.

The defendant moved the court to quash the indictment, because the same does not charge any offence known to the law, and because it does not allege that said party married a negro within the third generation inclusive. The court properly overruled defendant's motion to quash. By recurring to article 2016 of our Criminal Code, it will be seen that it is made a felony for any white person in this state to knowingly marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, &c. In this case the indictment charges that the defendant was a white person, and that he knowingly married a negro.

The defendant also filed a motion in arrest of judgment. The fifth ground set out in the motion in arrest of judgment is as follows: "Because the bill fails to charge the name of the woman, or negro, that defendant is charged to have married." We think the failure to describe the party by name that defendant married should have been taken advantage of by motion to quash and not

in arrest and that the verdict cured the omission. The offence being charged in the terms of the statute (to the disjunctive "or"), the indictment is good, on general exception. Had the exception been taken before the trial, it should have been sustained. A motion in arrest of judgment reaches substantial defects only: Pas. Dig., art. 3143. There are only three grounds of exception to the substance of an indictment in the Code, and the above is not one of them: Pas. Dig., art. 2954. Exceptions to matters not of substance must be taken before the trial by motion to quash, not by motion in arrest: *Terrel* v. *The State*, 41 Tex. 464; *State* v. *Williams*, 43 Id. 502; 1 Court of App., *Hancock* v. *The State*, Id. 357; *Long* v. *The State*, Id. 466. The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offence: Pas. Dig., art. 2865. Had the name been given the state would have been held to prove it as alleged; but, if not given, and no motion to quash on this account, then, in a subsequent prosecution, the defendant, under a plea of *autre fois convict* or *acquit*, could introduce evidence *aliunde* to identify the transaction: *Cook* v. *Bumly*, 45 Tex. 97. An indictment might be so framed by the pleader, in cases like this, as to meet the proof on trial by having two counts in it. The first count charging that the defendant married a negro, and the second count charging that he married a person of mixed blood descended from a negro within the third generation, inclusive, from said negro.

The District Court properly admitted in evidence the marriage certificate, with the return thereon of the minister who performed the marriage ceremony. The state did not rely, however, upon this marriage certificate alone to prove the marriage, but submitted to the jury the testimony of a person who was present and witnessed the marriage. The evidence shows that the defendant was married to one Mrs. Lettice Howell, in the county of Gregg, about the time charged in the indictment. The first witness introduced by the state "described Lettice Howell as having kinky hair, a flat nose, thick lips, of gingerbread complexion, nearly black, and that she was known by everybody as a negro." Upon cross-examination the witness said "he thought *she had white blood in her.*"

Emma Oliver, another state's witness, on her cross-examination, testified that she knew Lettice Howell had *white blood in her.* These were the only witnesses examined on this point.

"After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony whether asked or not:" Pas. Dig., art. 3059.

The last instruction given by the learned district judge who presided at the trial is in the following words: "The allegation that the defendant married a negro is not sustained by evidence that he married a person of mixed blood unless it is shown that she comes within the class designated in the law as negroes." This charge was calculated to mislead, and doubtless did mislead the jury. The jury might well conclude that, under the instructions of the court, they could find the defendant guilty if they were satisfied, from the evidence, that he married Lettice Howell, and that she was a person of mixed blood descended from negro ancestry.

For this error in the charge of the court, the judgment must be reversed and cause remanded.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF KANSAS.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF OHIO.[4]

BAILMENT.

Title to Property bailed to be manufactured—Replevin.—Where a railroad company having a quantity of old and worn out railroad iron, which it wished to utilize, entered into contract with a rolling mill company, by which the latter company was to re-roll into new bars or rails the old iron when delivered to it, and the rolling mill company was to add to the old iron a certain amount of new iron to form the head or top of the new rails, and thereafter, under said agreement, old iron was delivered to the rolling mill company by the railway company, and new rails were manufactured therefrom, with occasional additions furnished by the rolling mill company, and the railway company supplied the

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 6 or 7 Otto.

[2] From Hon. W. C. Webb, Reporter; to appear in 19 Kansas Reports.

[3] From opinions delivered at the January Term 1878. The cases will probably be reported in 37 or 38 Michigan Reports.

[4] From E. L. De Witt, Esq., Reporter; to appear in 31 Ohio State Reports.